

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 55583-9-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
MARK K. EATON,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>June 19, 2006</u>
)	
)	

PER CURIAM – A charging document is sufficient under chapter 10.61 RCW and the state and federal constitutions if it includes all essential elements of the crime.¹ Because the original amended information charging Mark Eaton was sufficient, and that information was not again amended prior to his retrial on the same charges, we affirm his conviction for possession of cocaine.

Eaton was charged by information with possession of amphetamine. At the beginning of trial, the State orally amended the information to accurately charge Eaton with possession of cocaine and a second count of disorderly conduct. Eaton's first trial resulted in a hung jury. Though another arraignment was unnecessary, the court arraigned Eaton a second time, prior to a re-trial,

¹ State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

using the original written information that incorrectly identified the alleged drug as amphetamine.

At the start of his second trial, Eaton moved to dismiss the charges on the basis of the defective information filed at the second arraignment. The court denied the motion. At trial, the evidence referred exclusively to cocaine possession. The jury instructions also identified the drug at issue as cocaine and contained no reference to amphetamines. After the conclusion of the State's evidence, Eaton again moved to dismiss, based on the State's failure to prove that he possessed amphetamine, as charged in the original information. The court denied the motion.

The jury convicted Eaton of possession of cocaine. Eaton appeals.

Sufficiency of the Information

Eaton argues that his conviction must be reversed because the court instructed the jury on a charge not in the information and the jury convicted him on that charge in violation of chapter 10.61 RCW and the state and federal constitutions. We disagree.

"All essential elements of a crime, statutory or otherwise, must be included in a charging document."² The purpose of this rule is to apprise the defendant of the charges against him or her and to allow the defendant to adequately prepare a defense.³ In a prosecution for possession of a controlled substance, the specific identity of the controlled substance is an essential

² State v. Kiorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

element of that offense.⁴

Eaton does not argue that the rearraignment was necessary. Rather, he argues that the State, having chosen to rearraign Eaton prior to retrying him, must be bound by that information it mistakenly presented in that proceeding. “[R]earraignment is not necessary when a case is remanded for a new trial. Rather, it is required when a case has been dismissed without prejudice and then refiled,” or when “there has been a substantial amendment to the information.”⁵ Here, Eaton’s case was not dismissed and refiled. He was retried following a mistrial on the same charge, under the same cause number. Eaton argues that, even if the State was not required to rearraign him prior to retrial, having arraigned him a second time, the State is bound by the information it used in that latter proceeding, but he cites no authority for this proposition.

The objective of requiring the essential elements of the crime to be contained in the information is to give notice to an accused of the nature of the crime so that the accused can prepare an adequate defense.⁶ The record clearly indicates that Eaton had notice of the charge against him. First, though the original information identified the controlled substance at issue as

³ Vangerpen, 125 Wn.2d at 787.

⁴ State v. Goodman, 150 Wn.2d 774, 787, 83 P.3d 410 (2004).

⁵ State v. Whelchel, 97 Wn. App. 813, 819, 988 P.2d 20 (1999).

⁶ Kjorsvik, 117 Wn.2d at 101.

amphetamine, the attached statement of probable cause mentioned cocaine exclusively. The State orally amended the information prior to trial, changing the charge to possession of cocaine. All the evidence presented at the first trial was that the controlled substance was cocaine.

The amended charges were never dismissed and the information from the first trial was never amended to change the charge back to amphetamine possession. Eaton's defense trial memorandum filed for retrial, as well as his pretrial Knapstad⁷ motion to dismiss, acknowledged that the charge against him was possession of cocaine.

Prior to his second trial, a judge denied Eaton's motion to dismiss on the grounds that he had been rearraigned on an incorrect information. The court found that the retrial was restricted to the charge in the amended information, which was still in effect notwithstanding the mistaken rearraignment. Reconfirming that the charge was possession of cocaine, the court found that Eaton had not suffered prejudice from the State's error and that he had sufficient notice of the charges against him. In addition, the court offered Eaton a continuance, which he declined.

Eaton contends that he is not required to show prejudice in order to prevail because under State v. Vangerpen,⁸ the amendment of an information to

⁷ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

⁸ 125 Wn.2d 782.

add an essential element automatically requires reversal. That case however, is distinguishable. There, the State moved to amend the information at the close of its case.⁹ Here, the initial information was amended prior to Eaton's first trial and was never subsequently amended. Moreover, Eaton's argument that "omission of an element from the information is per se prejudicial"¹⁰ fails because, as already discussed, the information on which Eaton was retried did not lack an essential element of the charge.

Finally, as additional authority, Eaton cites State v. Courneya in which the appellate court reversed the defendant's conviction for hit and run after a second trial because the State failed to amend a faulty charging document.¹¹ Courneya, however, is distinguishable. There, the State conceded the original charging document in the first mistrial was defective because it failed to include several non-statutory elements of the charged crime.¹² The State failed to amend that information and the defendant was convicted after a second trial.¹³ The court

⁹ Id. at 785, 788 ("With the 'essential elements rule' in mind, the issue in the present case is whether the information was amended too late in the trial process.").

¹⁰ Appellant's Reply Brief at 5 (quoting Vangerpen, 125 Wn.2d at 788-89).

¹¹ 132 Wn. App. 347, 349, 131 P.3d 343 (2006).

¹² Id. at 351-52.

¹³ Id. at 350.

rejected the State's argument that the policy underlying the notice requirement was satisfied because the missing elements were included in jury instructions in the first trial, holding that jury instructions, closing arguments, information charging similar crimes in the same proceeding, and like sources from a previous trial cannot supply missing elements not contained in the information.¹⁴

Here, the original information was amended prior to the first trial to include all essential elements of the charge. The State retried Eaton on the basis of that same information. Therefore, there was no reliance on other sources from the first trial to provide him with the requisite notice.

We affirm the judgment and sentence.

For the Court:

Cox, J.

Appelwick, CJ.

¹⁴ Id. at 354-55.

Becker, J.